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IN THE

Supreme Court of the United States

October Term, 1965

No. 1035

STATE OF CALIFORNIA,

Petitioner,

vs.

FAUSTO EDWARD FLORES,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

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Petition for Writ of Certiorari to the District Court of Appeal of the State of California.

The State of California prays that a Writ of Certiorari issue to review the judgment of the Fourth Division of the Second District Court of Appeal of the State of California entered in the above case on August 25, 1965.

Opinions Below.

The opinion of the Fourth Division of the Second District Court of Appeal of the State of California, attached hereto as Appendix A, is reported in 236 A.C.A. 931, 46 Cal. Rptr. 412.

Jurisdiction.

After rendition of the decision by the District Court of Appeal in *People v. Flores,* 236 A.C.A. 931, 46 Cal. Rptr. 412, petitioner timely filed a petition for hearing in the Supreme Court of the State of California which petition was denied on October 20, 1965. A copy of the order denying the hearing is included herein as Appendix B. Petitioner invokes the jurisdiction of this Court to review this decision under 28 U.S.C., §1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

Question Presented.

Do the decisions of this Honorable Court in *Escobedo v. State of Illinois,* 378 U.S. 478, 84 S. Ct. 1758, or *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199, require, in a state court criminal trial, the exclusion from evidence of a voluntary confession rendered by a defendant to an undercover police officer prior to the filing of formal charges where the defendant is unaware of the officer's status?

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, respondent, Fausto Edward Flores, was accused of murdering one Socorro Palomares, in violation of California Penal Code section 187, on August 20, 1963. [Clk. Tr. p. 1.]

Respondent pleaded "Not Guilty" [Clk. Tr. p. 3], and after trial to a jury was found guilty of murder in the first degree. [Clk. Tr. pp. 30A-31.] On trial of the penalty issue (California Penal Code section 190.1) to the

same jury, it reported that it was deadlocked, a mistrial as to penalty was declared, and the court fixed respondent's penalty at imprisonment for life. [Clk. Tr. p. 34.] Respondent's motion for a new trial, his petition for a writ of habeas corpus, and probation were all denied and he was sentenced to imprisonment in the State prison for the term of his natural life. [Clk. Tr. p. 38.] Respondent appealed from the judgment of conviction and his conviction was reversed in *People v. Flores, supra,* 236 A.C.A. 931, 46 Cal. Rptr. 412.

Statement of Facts.

Petitioner's brief in the California District Court of Appeal (therein known as Respondent's Brief, and included in the Certified Record forwarded herewith) contains a detailed résumé of the evidence produced in the trial court. The salient facts may be briefly summarized as follows:

The body of Socorro Palomares, a 16-year-old girl, was discovered in a Los Angeles park on the morning of August 21, 1963. [Rep. Tr. pp. 483-484.] An autopsy disclosed that death resulted from suffocation [Rep. Tr. p. 903] and that the decedent was about three weeks pregnant. [Rep. Tr. pp. 904-905.] The appearance of the body when discovered was such that she had apparently been sexually assaulted by her slayer. [Rep. Tr. pp. 487-488.] There was, however, evidence to indicate that the decedent had not in fact been sexually assaulted but that her slayer had purposely left the body so as to convey that impression. [Rep. Tr. pp. 938, 685.]

The evidence disclosed that the respondent, some two years prior to decedent's death, had fathered a child by

the decedent and that as a result thereof he had been convicted of statutory rape and placed under court order not to keep company with the decedent. He was also ordered to pay child support to the decedent. [Rep. Tr. pp. 944-947.] There also was evidence that decedent and respondent had consorted, notwithstanding the court order against it [Rep. Tr. pp. 558-559, 571-574, 1011-1015], that respondent was the sire of decedent's embryo, that decedent expected respondent to marry her [Rep. Tr. pp. 997, 1000], and that respondent was, at the time of decedent's death, married to another woman. [Rep. Tr. pp. 1438-1440.]

Respondent was arrested some four hours after decedent's body was discovered and was taken to jail where he was interrogated. [Rep. Tr. pp. 646-648, 686-704.] During this interrogation respondent denied any knowledge of the crime. He was then put in a jail cell. The following day, after respondent had been in custody some 30 hours, an undercover police officer, posing as a narcotic arrestee, was placed in the cell with respondent. [Rep. Tr. pp. 709-711.] The undercover officer remained in the cell for some 38 hours. [Rep. Tr. p. 712.] During this time he engaged in conversation with respondent, which conversation was taped by means of secreted electronic devices. In this conversation respondent confessed to the murder with which he was charged.

Relevant portions of respondent's confession to the undercover officer were introduced at respondent's trial and constituted the primary prosecution evidence against

respondent. The undercover officer's testimony as to this confession is set forth between pages 1126 and 1192 of the Reporter's Transcript. Pertinent excerpts from the confession are set forth hereinafter.

The Federal Question Presented for Review by This Court.

The decision of the District Court of Appeal herein clearly and squarely rests upon the authority of *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199 and *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758. The District Court of Appeal, while alluding to other aspects of the trial which might have constituted error, avoided deciding whether they did constitute error, and reversed the conviction on the ground that respondent's confession to the undercover police officer violated the rules established by *Escobedo v. Illinois, supra,* and *Massiah v. United States, supra.*[1]

. . . .

Petitioner is here in effect asking this Honorable Court to determine whether the opinion of the District Court of Appeal accurately interprets and correctly applies the mandates of this court as enunciated in *Escobedo* and *Massiah,* or whether the District Court of Appeal has extended the principles of those cases to a point beyond what was intended by this court.

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[1]The District Court of Appeal also cites *People v. Dorado,* 62 Cal. 2d 338, 42 Cal. Rptr. 169, as authority for its holding, but that case, in turn, purports to be compelled by *Escobedo v. Illinois.*

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED.

I.
Introduction.

By way of introduction, and to call the attention of this Court to the brutality of both the murder and the murderer here involved, the following excerpts from respondent's confession as set forth in the trial transcript are reproduced (with some editing for the sake of good taste):

> "Flores: You drop her—drop her in the sewers. That's what I wanted to do but I didn't have the time.
>
> "Miranda: Does a person die quick when—when they—they smother like that?
>
> ". . . .
>
> "Flores: Yes, You could hear the heart, pachoo, pachoo, pachoo, pachoo, pachoo, pachoo, pachoo, pachoo.
>
> ". . . .
>
> "Flores: It quits." [Rep. Tr. p. 1139, line 21, to p. 1140, line 11.]
>
> "Flores: —and when I put the towel—when I put the towel on her face, I tried to smother her with the towel. And then she said, 'I — I — I — Sonny, I can't breathe. You're trying to kill me. Scream — I'll scream — scream.'
>
> "I told her, 'Shut up.'
>
> "Miranda: She quit screaming, huh?
>
> "Flores: 'Shut up. Shut up.'
>
> "She shut up, the bitch. She no longer made a —she no longer made a fuss. She shut up. She was shut down." [Rep. Tr. p. 1158, lines 2-12.]

"Flores: If you kill once, you'd do it again. You don't give a. . . .

"You know why? You did it once and it's your life, man, it's either yours or them." [Rep. Tr. p. 1173, lines 16-22.]

"Miranda: After she was dead. After she was dead, did you spend any time with her?

"Flores: Just only listening to her heart to see when it would stop." [Rep. Tr. p. 1180, lines 5-9.]

While we recognize that the gruesomeness of a confession is not the measure of its admissibility, we consider this case a good example of the danger to society which inheres in extending privileges to criminals which inhibit the use of incriminating evidence.

II.
Exclusion of This Confession From Evidence Is Not Compelled by Massiah.

One of the two prime authorities upon which the California District Court of Appeal based its decision herein is *Massiah v. United States,* 377 U.S. 201, 84 S. Ct. 1199. For the reasons hereinafter set forth we maintain that *Massiah* is not applicable to this case.

A. Massiah's Statements Were Made After He Had Been Indicted.

As will be discussed in more detail under heading III, *infra,* the time at which defendant renders an extrajudicial incriminating statement is frequently important in determining the admissibility of the statement.

In the case at bar *Massiah* is of no aid to us because in *Massiah* the incriminating statements made by the accused were made after he had been indicted. In the

instant case Flores' statements were made before any formal charges had been filed. Since an indictment is an "accusatory" pleading, it is thus axiomatic that *Massiah* was "accused" at the time he made his statements.

In the present case a threshold question is whether Flores was "accused" at the time he made his statements. To rely on *Massiah* as authority for excluding the confession in this case is to beg that threshold question, and we therefore maintain that *Massiah* should not be considered as bearing on the distinct facts of this case.

B. Massiah Is Silent Upon the Constitutionality of the Use of Deception in Obtaining Statements.

On its face, *Massiah* might appear to have applicability to this case because of the similarity between the two cases as to the manner in which the incriminating statements were obtained. Both Massiah and Flores confessed to police agents and both were unaware of the identity and status of the agents at the time they confessed.

But it must be remembered that the decision in *Massiah* does not condemn the use of undercover police operatives in obtaining statements from a defendant. *Massiah* rests solely upon the denial to the defendant of his right to counsel. Petitioner is unaware of any decision of this court which would preclude admission of Flores' confession simply because he was unaware of the status of the person to whom he confessed. The most recent pronouncement of this court (in *Lopez v. United States,* 373 U.S. 427, 83 S. Ct. 1381) would seem to indicate no impropriety in the use by police of some measure of deception in obtaining incriminating statements.

Therefore petitioner does not believe *Massiah* has any application to this case.

III.

Exclusion of This Confession From Evidence Is Not Compelled by Escobedo.

If the District Court of Appeal assumed that its decision in this case was impelled by *Escobedo v. Illinois,* 378 U.S. 478, 84 S. Ct. 1758, we submit that assumption is erroneous. The facts in *Escobedo* differ so markedly from the facts in this case that we believe only this Court is qualified to make the lengthy leap in interpretation which would bring this case within the ambit of *Escobedo.*

In *Escobedo* the following factors were significant: (1) defendant's arrest was occasioned by information from his codefendant that he, defendant, had fired the fatal shots, (2) defendant had once previously been arrested and interrogated on the same charge, but released, (3) upon his second arrest defendant immediately asked for the advice of his lawyer when interrogation commenced, (4) defendant's lawyer was present in the building where derendant was interrogated, repeatedly requested to see defendant, and these requests were denied, (5) during the course of his interrogation defendant repeatedly requested to see his attorney, and these requests were likewise denied.

As distinguished from *Escobedo,* in the present case respondent (1) never demonstrated a reluctance to talk to the officers about the crime, (2) never requested to see an attorney, (3) was not prevented from contacting an attorney, (4) was not subjected to an official interrogation productive of incriminating statements as was *Escobedo,* and (5) made his statements to Officer Miranda on a completely voluntary basis.

We do not take issue with the efforts of this Court[2] to (1) insure that the guarantees of the Bill of Rights are viable protections to criminal defendants, and (2) to discourage police conduct which smacks of overbearing or high-handedness. But in the case at bar we do not believe that the decision of the California District Court of Appeal accomplishes either of these objectives. Here, law enforcement officers were guilty of no reprehensible or even questionable conduct. All they did was make available to respondent a person in whom he might choose to confide, if he wished. The officers did not engage in any coercion whatever. Respondent's decision to incriminate himself in his conversation with Officer Miranda was entirely his own. Thus petitioner contends that reversal of this conviction (and presumably, therefore, future similar cases) will not have any curative effect in the sense of curbing any vicious police practice. This case simply reveals no vicious practice to be curbed.

From the standpoint of protecting an accused's constitutional rights, we similarly submit that this case reveals no violation of any constitutionally protected right of respondent.

As said recently by at least one federal court:

> "This Court is unable to find any cases which require a lawyer to be present at a time when a confession is voluntarily given."
>
> *Hayes v. United States,* 235 F. Supp. 225, 226 (U.S.D.C., E.D. Mo., 1964).

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[2]As reflected, for example, in such cases as: *Powell v. Alabama,* 287 U.S. 45, 53 S. Ct. 55; *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205; *Spano v. New York,* 360 U.S. 315, 79 S. Ct. 1202; *Leyra v. Denno,* 347 U.S. 556, 74 S. Ct. 716; *Brown v. Mississippi,* 297 U.S. 278, 65 S. Ct. 461; *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684.

Nor was respondent's right to counsel, as that right is articulated in *Escobedo,* here violated. In *Escobedo* this court said at 378 U.S. 490-91:

> "We hold, therefore, that where, as here, *the investigation is no longer a general inquiry into an unsolved crime* but has begun to focus on a particular suspect, the suspect has been taken into police custody, *the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer* and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsell" in violation of the Sixth Amendment to the Constitution. . . ." (Emphasis added.)

First, and fundamentally, this case is distinguishable from *Escobedo* because here respondent did not make, and was not denied, a request for counsel. But even if we assume that respondent had made such a request, this case is still distinguishable from *Escobedo* because, we contend, (1) at the time of respondent's confession this case was still in the investigatory phase, and (2) the police did not carry out a "process of interrogations" as that phrase is used in *Escobedo.* Thus, Flores' right to counsel had not matured when this confession was rendered.

A. The Accusatory Stage Had Not Been Reached.

While we concede that respondent Flores was heavily suspect at the time of his arrest in the instant case, we cannot concede that the "accusatory stage" of proceedings against him had been reached at the time of his

confession. Even the California District Court of Appeal recognizes the paucity of other evidence, besides the confession, against respondent. (See footnote 2, p. 8, of D.C.A. opinion.) It is with reliance upon this paucity of other evidence against respondent that we urge the *investigative* nature of the police technique here employed. This was certainly not a case where police officers were attempting to completely nail down an already good case against respondent by eliciting a confession. On the contrary, without respondent's confession they had no solid case against any suspect. Under these circumstances it seems to follow that what the police did in this case was necessarily investigative in nature.

B. The Police Did Not Engage in a "Process of Interrogations."

Furthermore, we submit that in this case the actions of the police did not constitute a "process of interrogations that lent itself to eliciting incriminating statements" under what we construe as the proper interpretation of that phrase as it is used in *Escobedo.*

We agree that a practice by police of harassing and badgering a frightened, confused suspect by teams of trained and toughened interrogators under batteries of hot, white lights is alien to our system of justice. But on the other hand we see nothing morally, socially, or legally reprehensible in merely providing a defendant with the means to confess a crime. As Justice Traynor of the California Supreme Court said only a few short years ago, relying on Justice Frankfurter's opinion in *Culombe v. Connecticut,* 267 U.S. 568, 81 S. Ct. 1860:

> "So long as the methods used comply with due process standards, it is in the public interest for

the police to encourage confessions and admissions during interrogation."

People v. Garner, 57 Cal. 2d 135, concurring opinion at page 164.

Here we do not even have an "interrogation." True, a sounding board was placed in respondent's cell for him to use as he saw fit. But we submit that this is little different from supplying a suspect with a piece of paper on which he might write a confession if he chooses.

When this Court's 1964 language in *Escobedo* is juxtaposed its 1961 language in *Culombe v. Connecticut, supra,* we believe that the meaning of the phrase "process of interrogations" is made clear. *Culombe* recognizes our society's abhorrence of measures approaching the lash and the rack[3]; but it also recognizes our historical practicality in criminal law which has led us away from excluding from evidence completely voluntary and uncoerced expressions of self-guilt.[4]

We submit that the "process of interrogations" envisioned in *Escobedo* is one wherein at least some vestiges of police station "grilling" are present. Where ingredients of police station grilling are absent, where there is no element of coercion, physical or psychological, we contend that the "process of interrogations" described in *Escobedo* does not exist. Otherwise, anything done by a police officer in the process of investigating crime, so long as it results in the discovery of incriminating evidence, can be classified as a "process of interrogation," ringing down ironclad rights to counsel as against any suspect.

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[3]*Culombe v. Connecticut, supra,* 367 U.S. at 567-68.

[4]*Id.,* at 588-91.

For this reason we submit that the conduct of the police here, however subtle and however productive it may have been, cannot be classified as a "process of interrogations."

Conclusion.

For the reasons hereinbefore stated petitioner submits that the decision rendered in this case by the California District Court of Appeal was not compelled by any decision of this court. We respectfully urge this court to grant our petition for a writ of certiorari because we believe that the decision of the California District Court of Appeal strikes a dangerous and illogical balance between the competing considerations here involved. Where a confession is wholly voluntary, and where there is no element of coercion or grilling on the part of the police, we believe that the best interests of society are served by allowing it into evidence. There is little evidence of guilt more compelling than such a confession. To preclude its use at trial is in this case to set at large in society an extremely dangerous person who has indicated a willingness to kill again.

Petitioner therefore respectfully requests that this petition be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the District Court of Appeal.

[Crim. No. 10169. Second Dist., Div. Four. Aug. 25, 1965.]

The People, Plaintiff and Respondent, v. Fausto Edward Flores, Defendant and Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. J. Howard Ziemann, Judge. Judgment reversed; appeal from order dismissed.

Prosecution for murder. Judgment of conviction of first degree murder reversed solely on the constitutional ground announced in *People v. Dorado,** 62 Cal.2d 338 [42 Cal.Rptr. 169, 398 P.2d 361].

Patrick J. Sampson, under appointment by the District Court of Appeal, for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and C. Anthony Collins, Deputy Attorney General, for Plaintiff and Respondent.

Kingsley, J.—Defendant was charged with murder in violation of section 187 of the Penal Code. He pled not guilty and, after a jury trial, he was convicted of murder in the first degree. The jury was unable to agree on the penalty and the trial court, exercising the discretion granted it by section 190.1 of the Penal Code,

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*Advance Report Citation: 62 A.C. 350.

imposed a sentence of life imprisonment. Defendant has appealed.[1]

The victim, a 16-year-old girl named Socorro Palomares, left her home in the morning of August 20, 1963, purportedly on her way to work; no witness testified to seeing her again until about 7:15 a.m., on the morning of August 21st, when a park employee discovered her body lying on a slope in a remote portion of Elysian Park. She had met her death by smothering in the early evening of August 20th and she had had sexual intercourse within 24 to 36 hours before her body was discovered. She was from three to four weeks pregnant. Although an attempt had been made to make it appear that she was victim of a rape, the condition of her body and clothing, in the uncontradicted opinion of the medical and police witnesses, rebutted that theory.

Defendant had known the victim for some time and, about two years before, had been convicted of statutory rape against her. He was on probation, under orders to support the child who was born of the earlier relation and under a prohibition against seeing the victim other than in the presence of her mother in connection with visits to the child. There was evidence that defendant, who had married another woman after his conviction, was still seeing the victim and that she had told friends that the new pregnancy was by defendant.

It was the theory of the prosecution that defendant and victim had gone to the beach together on August 20th; that she had then threatened to tell her mother of the new pregnancy; that, fearing that this disclosure

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[1]The notice of appeal, filed by defendant in propria persona, is both from the judgment and from the order denying a new trial. The latter order is not appealable (Pen. Code, § 1237), and that portion of the appeal must be dismissed.

would result in revocation of his probation, defendant had driven the girl to the park shortly after dark and there smothered her, arranged her clothing to simulate a rape, and then gone home.

Defendant worked at a car washing establishment. He did not report for work on August 20th. On the morning of August 21st he reported for work but was laid off for lack of business. He asked, and received, permission to use the car wash for washing his car and did so, vacuuming the interior and performing other cleaning and polishing with the help of his fellow employees.

Defendant was arrested about noon on August 21st. He told the officers conflicting stories as to his movements on the day and evening of August 20th; in all of them he claimed to have gone to the beach that day, leaving the beach at about 7:30 p.m. His stories varied as to whether he was accompanied by a friend named "Bouncer" or by a stranger whom he met at the beach, and as to the manner in which he spent his time after leaving the beach and prior to picking up his wife at her parent's home about 10:30. However, throughout, he denied having seen the victim on that day or knowing anything about her death.

On August 22d, the police officers arranged to have an undercover police officer placed in defendant's cell, purportedly as being under arrest for a narcotic offense. A microphone was placed in the cell and the conversation between defendant and the officer, covering about three days, was taped. Portions of this conversation were repeated to the jury as part of the prosecution's case. The Attorney General agrees that they amounted to a confession of murder and a description

of the manner in which it was accomplished. In addition, sundry objects, some corroborative of defendant's story and some incriminatory, were taken from his automobile after it had been impounded by the police and after a delay of several days, and these articles were introduced into evidence.

The case was tried in April of 1964, prior of the decisions in *Massiah v. United States* (1964) 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246], and in *Escobedo v. Illinois* (1964) 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], and to the decision in *People v. Burke* (1964) 61 Cal.2d 575 [39 Cal.Rptr. 531, 394 P.2d 67] —and, of course, long prior to the final decision in *People v. Dorado* (1965) [*]62 Cal.2d 338 [42 Cal. Rptr. 169, 398 P.2d 361]. Judged by the rules as they were generally understood in August of 1963, when the case was under investigation, and in April 1964, when it was tried, the conduct of the police and of the trial court was not open to question. But the cases above cited, and applicable in this court on this appeal, compel a reversal.

I.

The victim's body was discovered about 7:15 a.m., on August 21st. Defendant was arrested, without a warrant, at approximately 11 a.m., on the same day. The arresting officer testified that he merely told defendant that he was under arrest, but that he did not tell him for what offense. Defendant was seated in the police car and, shortly thereafter, he volunteered the statement: "I was home last night with my wife. I watched television. I took a shower and I went to bed." Defendant was thereafter transported to the police

[*]Advance Report Citation: 62 A.C. 350.

station, where, at about 12:30 p.m., he was interrogated by two officers, giving the first of his accounts of his activities the previous day. A second interrogation took place at about 6 p.m., at which time defendant, having in the meantime talked with his parole officer, was asked to "think it over" until the next morning. A third interrogation took place on the morning of August 22d. During this conversation, defendant told a somewhat different story both as to his relations with the victim and as to his movements during the early evening of August 20th. This third conversation was punctuated by statements by the officers to the effect that they did not believe him, and that they knew he had murdered the girl and with exhortations to "tell what really happened."

It was after this conversation that the officer in charge of the case arranged to have the undercover officer placed in defendant's cell. The undercover officer was told that the officers believed that defendant had murdered a young girl and that "we wanted him [the undercover officer] to get in the cell and act dumb and see what information he could get regarding his [defendant's] activities on that day."

II.

Since the first statement to the police was volunteered, it clearly did not violate the *Dorado* rule. Because we must reverse the conviction, under *Dorado,* by reason of the use of the confession obtained by the undercover officer, we need not consider whether or not any of the statements made to the officers in the police station interrogations were also inadmissible. If the case is retried, both the People and the defense will have an opportunity to explore the circumstances surrounding

those interrogation sessions in the light of the principles expounded in *People v. Stewart* (1965) [b]62 Cal.2d 571 [43 Cal.Rptr. 201, 400 P.2d 97] and other recent decisions.

For the same reason, we do not consider the applicability of *People v. Burke, supra* (1964) 61 Cal.2d 575, to the use of the articles discovered in the search of defendant's automobile, at the police station and some time after his arrest.

III.

The conviction must be reversed because of the use against defendant of the conversation in his jail cell between him and the undercover officer. Not only was this as the Attorney General admits, a full confession, but it was the principal basis of the People's case and the only evidence which directly connected defendant with the victim on the day of her death.[2] We can see no grounds for distinguishing this case from *Massiah v. United States, supra* (1964) 377 U.S. 201, or from *Spano v. New York* (1959) 360 U.S. 315 [79 S.Ct. 1202, 3 L.Ed.2d 1265]. It is true that defendant here was not yet under indictment; but that factor has been held to be immaterial in *People v. Dorado,* supra (1965) [c]62 Cal.2d 338. Except for the absence

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[b]Advance Report Citation: 62 A.C. 697.

[2]Defendant admitted being at the beach that day; sand of the type usually found on our beaches, was found in the seams of the victim's blouse. While this supports the theory that she, also, had gone to the beach, it, by itself, hardly proves that she had gone there with defendant.

It is of some significance that, in describing the conversation between Teale and his cell mate, Mr. Justice Peek stated: "No claim is made and the record does not disclose that Teale's fellow prisoner was acting in complicity with the state." (*63 Cal. 2d ...., ...)

*Advance Report Citation: 63 A.C. 175, 182.

[c]Advance Report Citation: 62 A.C. 350.

of an indictment, we have here a defendant under arrest, on whom the suspicion of the police had already fastened, a process of interrogation by a police officer conducted for the express purpose of securing incriminating statements and—of course—without warning of constitutional rights. The evidence—clearly prejudicial—was illegally secured and illegally introduced.

We do not deal here with statements made by a defendant to a cell mate and testified to by the latter, as was the case in *People v. Teale* (1965) [d]63 Cal.2d .... [.... Cal.Rptr. ...., ... P.2d ....]; nor with statements secured by the police by listening in on conversations between two or more suspects, as in *People v. Ketchel* (1963) 59 Cal.2d 503, 519-522 [30 Cal.Rptr. 538, 381 P.2d 394], in *People v. Ross* (1965) [e]236 Cal.App. 2d .... [.... Cal.Rptr. ....], in *People v. Boulad* (1965) [f]235 Cal.App.2d .... [45 Cal.Rptr. 104], and in *People v. Bazaure* (1965) [g]235 Cal.App.2d .... [44 Cal.Rptr. 831]. Nor do we deal with the testimony of an undercover officer as to statements made to him in the course of commission of the crime itself, nor with statements secured by an undercover officer during the course of procedures preceding arrest. We are concerned, here, only with a case in which, after arrest, and after suspicion had definitely focused on defendant, a police officer, pretending to be a private citizen, initiated a conversation calculated (and here designed) to procure a statement from a defendant which would amount to

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[d]Advance Report Citation: 63 A.C. 175.
[e]Advance Report Citation: 236 A.C.A. 387.
[f]Advance Report Citation: 235 A.C.A. 138.
[g]Advance Report Citation: 235 A.C.A. 24.

a confession of the crime with which that defendant was later charged.[g]

The Attorney General argues that, since the statement here was made to one thought by defendant to be a fellow prisoner, it was as voluntary as those in the cases above cited, any possible element of awe or fear of the police being absent. But the rule herein involved assumes that the statements were voluntary and thus admissible under the older rule; it is not an extension of the rule on voluntary confessions, but an additional rule, resting on other considerations spelled out in detail in *Dorado* and in the cases therein analyzed. The difference between this case and those where the statement was made to a legitimate fellow prisoner is important. In the true "fellow prisoner" cases, there is no "process of interrogation" but, rather, statements volunteered in the course of ordinary conversation. Here, however, defendant was subjected, as a reading of the transcript discloses, to a long course of skillful prodding, by a trained police officer, carefully calculated to induce him to discuss his crime and to make incriminating statements concerning his part in it.

Since the jail cell conversations were inadmissible for the reason above stated, we need not consider the argument against their admissibility based on section 825 of the Penal Code.

The judgment is reversed; the purported appeal from the order denying a new trial is dismissed.

Files, *P.J.* and Jefferson, *J.* concurred.

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[g]The same basic situation was involved in *In re Lopez* (1965) [h]62 Cal. 2d 368 [42 Cal.Rptr. 188, 398 P.2d 380], in which the Supreme Court assumed, for the purpose of the issue of retroactivity of *Dorado*, that a statement obtained by placing a stool pigeon in defendant's cell was inadmissible under the *Escobedo-Dorado* rule. (See [i]62 Cal.2d at page 372, footnote 1.)

[h]Advance Report Citation: 62 A.C. 380.

[i]Advance Report Citation: 62 A.C. at p. 384.

APPENDIX B.

Order Denying Hearing After Judgment by District Court of Appeal, 2nd District, Division 4, Crim. No. 10169.

Order Due
October 22, 1965

In the Supreme Court of the State of California In Bank.

People v. Flores.

Filed Oct. 20, 1965

Respondent's petition for hearing Denied.

Traynor
Chief Justice